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IN THE

Supreme Court of the United States

October Term, 1960.

No. 233

BERNHARD DEUTCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT.

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*To the Honorable the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:*

Petitioner, Bernhard Deutch, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW.

The judgment and sentence of the District Court are reported in 147 F. Supp. 89; the opinion appears on pages 27 to 31, inclusive, of the Joint Appendix and the judgment and commitment appear on pages 33 and 34 of the Joint Appendix. The opinion of the Court of Appeals has not been reported but is printed in Appendix A. *infra*, pp. 1a-11a.

JURISDICTION.

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the conviction were entered on June 18, 1960. Motion for stay of judgment pending filing of this petition was entered on June 28, 1960. The jurisdiction of this court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED.

Petitioner appeared in response to a subpoena, and under protest as to the "constitutionality" of the proceeding and the "jurisdiction" of the committee, testified fully before a subcommittee of the Committee on Un-American Activities of the House of Representatives concerning his past activity as a member of a student Communist group on the campus at Cornell. He refused to answer certain questions identifying by name his associates. He was subsequently indicted for contempt and convicted of violating 2 USC § 192. The questions presented are:

1. In determining whether a witness was aware of the subject under inquiry, can he be charged with legal knowledge of statements of subcommittee chairman and of testimony of other witnesses, of which he has no actual knowledge?

2. Is the requirement that the subject matter under inquiry appear to the witness with undisputed clarity waived because the witness, in voicing objection to the committee's jurisdiction to ask the questions, does not specifically object to pertinency?

3. Must the subject of the inquiry proved by the government at trial under 2 USC § 192 be the same as the subject matter covered at the hearing?

4. If the witness was aware of the subject of the hearing, which subject, if proved at trial would sustain

a conviction under 2 USC § 192, may the conviction be sustained if the government at trial proved another subject of which the witness was unaware?

5. May a conviction under 2 USC § 192 be sustained on appeal by finding a subject under inquiry at variance with the subject proved by the government at trial?

6. Where a witness has disclosed every aspect of the activities, character, aims and extent of a student Communist group, withholding only names, is there a valid legislative purpose in the acquisition of such names?

7. In determining whether the First Amendment protected petitioner from compulsory disclosure of past political association, should the doctrine of *Barenblatt v. United States*, 360 U. S. 109 (1959), be extended in favor of the investigative power and in derogation of the protection of the First Amendment?

STATUTES INVOLVED.

2 USC § 192, R. S. 102 (52 Stat. 942), as amended, provides:

“Refusal of witness to testify.

“Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.”

Petition for a Writ of Certiorari

Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 812, 823, 828) provides in relevant part:

"(b) Rule XI of the Rules of the House of Representatives is amended to read as follows:

"Rule XI

"Power & Duties of Committees

"(1) All proposed legislation, messages, petitions, memorials, and other matters relating to the subjects listed under the standing committees named below shall be referred to such committees, respectively: . . .

"(q)(1) Committee on Un-American Activities.

"(A) Un-American activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

STATEMENT.

The petitioner, Bernhard Deutch, was convicted in the District Court of the District of Columbia for violation of 2 USC § 192 for refusing to answer certain questions before a subcommittee of the House Committee on Un-American Activities. The counts upon which the petitioner was convicted and sentenced to 90 days and a fine of \$100 set forth the questions as follows:

1. The committee was advised that a witness by the name of Ross Richardson has stated that you acted as

liaison between a Communist Party group on the campus and a member of the faculty at Cornell, and that you knew the name of the member of that faculty, who was a member of the Communist Party. Will you tell us who that member of the faculty was?

2. Will you tell the committee, please, the source of that \$100 contribution, if it was made?

3. [Judgment of acquittal.]

4. Were you acquainted with Homer Owen?

5. The witness is directed to give the name of the person by whom he was approached.

At the time the petitioner was subpoenaed, which was April 7, 1954, he was 24 and a graduate student of physics at the University of Pennsylvania. He had previously been an undergraduate at Cornell University.

The petitioner appeared and with his counsel was shown into an office in which there were several unidentified men; he was sworn and without preamble, the questioning commenced. There is no evidence in the record that the particular subcommittee before whom petitioner appeared ever heard any other witnesses on any subject.

After introductory questions of name and address, committee counsel stated:

"Mr. Deutch, during hearings at Albany last week, the committee heard testimony regarding the existence of a Communist Party group or cell operating among undergraduates at Cornell University, among certain graduates at Cornell and in the city of Ithaca.

"In connection with that testimony, the committee was informed that you were a member of one or more of those groups. If so, I would like to ask you certain matters relating to your activity there.

"Were you a member of a group of the Communist Party at Cornell?" [J. A. 56]

The petitioner objected to "the jurisdiction of this committee" and answered "under protest as to its constitutionality". *The petitioner freely answered all questions concerning himself and testified fully as to the activities of the student group but refused to identify individuals by name.* He told the committee that he was no longer a member of the Communist Party, that he had been a member of the student-Communist Party at Cornell and that "when I was in the Communist Party all that happened were bull sessions on Marxism and some activities like giving out a leaflet or two. The people I met did not advocate the overthrow of the government by force and violence and if they had I would never have allowed it."

He stated he had joined the Party at the age of 19 and that the time of his quitting would be approximately the time of the last meeting he attended, to which meeting he was conducted by a Mr. Ross Richardson, the leader of the group and an undercover employee of the FBI. He testified that the group became defunct, that he did not know where the headquarters of the Party was in Ithaca, that the \$100 contribution had not come from a faculty member and that the only faculty member he knew of had quit the Communist Party, as the FBI agent Richardson knew. Petitioner gave considerable further details as to the size and activities of the Cornell group.

In protesting the committee's efforts to obtain the names of his associates, petitioner said, "I think—I happen to have been a graduate student—the only one there, and the organization is completely defunct, and the individual you are interested in was not even a professor. The magnitude of this is really beyond reason." To which protest one of the individuals present (who in the committee print is identified as Congressman Jackson) replied:

"That decision does not rest with you as to whether or not the scope of this inquiry—as to whether or not certain individuals are important now or not. That is

the responsibility of we representatives to determine. That determination cannot rest with you. It may be very true that the individual to whom you have referred is no longer a member of the Communist Party. However, that is a supposition on your part—and a supposition which the committee cannot accept." [J. A. 57]

In reference to the petitioner's having stated that he had moral scruples against informing on others, one of the individuals present (identified in the committee transcript as being Representative Doyle) stated that it was the committee's duty to investigate "all Communist activities" and they were inquiring "into the extent" and that "this question goes into the extent".

At trial, the government offered documentary evidence of statements made by other chairmen of other subcommittees of the House Committee on Un-American Activities at other places (objected to as not having been available to petitioner at the time of his appearance) which established that those chairmen stated that those subcommittees were "investigating Communism within the field of labor" (App. A. p. 4a). The government presented one witness (subcommittee counsel Tavenner), who testified that the subject of the hearing was Communist activities in Albany. No evidence was presented tending to show that the subject of petitioner's hearing was Communism on the Cornell campus and government witness and counsel negated this subject.

The trial court (Holtzoff, J.) without a jury, found that "the committee was investigating the infiltration of Communism into educational and labor fields" (J. A. 29). On appeal, the government urged that the subject under inquiry was the *inter-relationship* between the fields of labor and education. The Court of Appeals found that petitioner was, or should have been, aware of the subject matter under inquiry and the pertinency of the questions thereto but did not state specifically what the subject matter was (App. A.).

REASONS FOR GRANTING THE WRIT.**I.**

Petitioner's Conviction Is Based Upon an Erroneous Interpretation of the Standards Laid Down by This Court With Respect to the Requirement That the Subject Matter Under Inquiry Appear With Indisputable Clarity.

The petitioner contends that the standards by which it is to be determined whether a witness before a Congressional committee has been made aware of the existence of a valid legislative subject have been set forth in the cases of *Watkins v. United States*, 354 U. S. 178 (1957) and *Barenblatt v. United States*, 360 U. S. 109 (1959), and that the decision of the Court of Appeals conflicts with those standards.

A. *It Is Not Required That Any Particular Form of Words Be Used by a Witness in Raising the Question of Pertinency.*

Petitioner at the outset made a broad objection to the "jurisdiction" of the committee to ask the questions seeking to elicit the names of his past associates and an equally broad objection to the "constitutionality" of the proceedings. Subsequently, in lay language, he protested the efforts of the committee to ascertain the names of his associates on the grounds that the whole matter was too picaresque and trivial to prompt a Congressional committee to require him to answer under pain of contempt. Like Watkins, he indicated that his *motivation* in withholding the names of others was based on moral scruples against informing. It is not contended that petitioner ever specifically objected to any particular question on the grounds of pertinency in so many words. It is contended that his general objection at the outset, plus the subsequent colloquy

as to whether the names of others were important, is as much a raising of the whole issue of subject matter and pertinency as in the *Watkins* case.

It must be recalled that, although judicial characterizations of *Watkins'* position in later cases seem to imply that *Watkins* specifically objected on the grounds of pertinency, actually *Watkins'* objection was merely a passing reference to the relevancy of the names of others to the work of the committee in the midst of a statement declaring that he was unwilling to inform on others.

B. Even If It Be Assumed That Petitioner's Posture at His Hearing Did Not Constitute an Objection on the Grounds of Pertinency or Unawareness of Subject Matter, the Necessity for a Witness to Be Informed as to Subject Matter Exists Independently of Objection by Him in This Particular.

It is an essential element of the crime of contempt of Congress that the questions upon which conviction is based be pertinent to the subject under inquiry and that this subject appear to the witness with indisputed clarity at the time of his hearing. This court pointed out in the *Barenblatt* case that its opinion in the *Watkins* case had suggested five sources of information by which this element of the crime might be satisfied. It is contended that by each of these avenues of information the petitioner had less information than was available to *Watkins* or *Barenblatt*.

It is agreed that the authorizing resolution is not helpful in this respect in the case of the House Committee on Un-American Activities because of its vagueness and breadth.

In the petitioner's case, there were no other witnesses and there were no general statements of the purpose of the particular subcommittee. In fact, it does not appear that this particular subcommittee was convened for any other purpose than to hear petitioner himself or that it ever heard any other witness at any time on any subject.

It is true that the subcommittee counsel informed the witness that they had heard testimony regarding the existence of a Communist Party group on the campus at Cornell and had been informed that petitioner was named as a member and stated to petitioner that he would like "to ask you certain matters relating to your activity there." Of course, petitioner testified without reservation as to his own activity. However, it is conceded that petitioner knew that the questions dealt with the Communist group at Cornell; this is obvious. This, however, is still less than was available to Watkins who likewise knew that the general subject was Communists in labor unions in the Chicago area.

The final possible way by which a witness may be apprised of a subject matter is through the response of committee members to witness's refusal or protest. The only response which petitioner got to his protests was a general statement by Congressman Doyle that the committee was empowered to investigate the extent of all Communist activities, and in a subsequent colloquy the assertion by Congressman Jackson that the witness was not entitled to further information as to the scope of the inquiry. Whether petitioner's opening blanket objection on the grounds of "jurisdiction" and "constitutionality" was sufficient to trigger the duty to delineate the subject matter and its connection with legislative purpose, it is contended that the subsequent colloquy (which is set forth verbatim *infra* under the Statement section) constitutes a plea, in layman's language, for information and explanation.

In the *Watkins* case, in accordance with the principle of *Kilbourn v. Thompson*, 103 U. S. 168 (1880), this court, speaking through the Chief Justice, stated that "committees are restricted to the missions delegated to them, i.e. to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere. No witness can be compelled to make disclosures on matters outside that area. This is a jurisdictional concept of pertinency . . ."

Early in the hearing, in a colloquy with the subcommittee chairman petitioner said it was simply a case of "I had certain ideas and people I came in contact with had certain ideas. I didn't believe in force or violence, or anything like that . . . I think the whole thing has been magnified more than it should have been . . . I do not want to be in contempt of the committee . . ."

"Mr. Jackson. You therefore refuse to answer the question that is pending, is that correct?"

"Mr. Deutch: Yes, sir, but I could amplify that point. I do not mean the point of contempt. I think—I happen to have been a graduate student—the only one there, and the organization is completely defunct, and the individual you are interested in wasn't even a professor. The magnitude of this is really beyond reason." [J. A. 56, 57]

A fair reading of these protests of petitioner is in effect that in view of the insignificance of the group, the insistence of the committee amounted to the collection of past minutiae, which the *Watkins* opinion characterized as leading to "exposure of private lives in order to gather data that is neither desired by the Congress nor useful to it." Counsel might have put it in the form of a request to be informed of how the information sought related to data needed by the Congress, but it must be remembered that the committee does not permit counsel to speak.

The committee chairman understood this as having raised such a question and it is contended that petitioner was entitled to at least some information. The response, however, was to the effect that he was not entitled to be further enlightened:

"That decision does not rest with you as to whether or not the scope of this inquiry—as to whether or not certain individuals are important now or not. That is the responsibility of we representatives to determine. That determination cannot rest with you." [J. A. 57]

There is no doubt that the witness, and probably also his counsel, was groping, but there is also no doubt that he sought some enlightenment beyond the obvious fact that the committee was asking questions about the activities on the Cornell campus. The extreme youth of the witness and the fact that the hearing was an isolated event unconnected with any course of inquiry (other than that the witness had been named as a Communist) required that some explanation be afforded the witness if he were expected to make the hard choice of going beyond complete candor as to himself by giving the names of others.

II.

The Government Is Committed to the Subject Proved at the Trial and Conviction Cannot Be Sustained if This Subject Was Either Untouched Upon at the Hearing or Unknown to Petitioner and It Is Too Late on Appeal for the Government and the Courts to Construe a Subject Other Than That Proved at Trial.

The opinion of the Court of Appeals does not deal with this contention of petitioner, although it was extensively briefed and argued and constitutes petitioner's main ground for urging reversal.

It is curious that it has been held that the subject appeared to petitioner with indisputable clarity and yet the prosecution has at different times during the course of the case nominated a number of different subjects, and furthermore, that nowhere in the opinion of the Court of Appeals is it stated what, in the opinion of that court, the subject was.

A. At Trial the Government Proved the Subject Was Communist Activities in the Albany Area and/or Communism in the Field of Labor, and Introduced Evidence That the Subject Was Not Communism in Education.

The transcript of petitioner's hearing before the subcommittee plainly shows that, while the subject under in-

quiry in the sense required by the statute was not clear, the questions themselves largely concerned the student Communists on the Cornell campus. *No questions touched upon infiltration into labor or the Albany area.* The committee print of petitioner's appearance bore the title "Communist Methods of Infiltration—Education—Part 8."

At the outset of trial, the government introduced into evidence a series of reprints of testimony before various other subcommittees of the House Committee on Un-American Activities—specifically the opening statements of a subcommittee chairman made at certain earlier hearings held in Chicago and the statements of the chairman of the subcommittee which held earlier hearings in Albany. Over objection on the grounds of relevancy and materiality (there being no connection established between said hearings and petitioner or evidence that he was aware that said hearings had been held) the documents were admitted. A lengthy excerpt from the preamble to the Albany hearings is set forth in the opinion of the Court of Appeals, the gist of which is contained in the following sentence: "This committee is not investigating labor unions, but it is investigating Communism within the field of labor where it has substantial evidence that it exists." The Chicago material was similar [J. A. 42].

The government then introduced a committee print of the testimony of Ross Richardson, the FBI agent who had been the group leader of Deutch's group, wherein he named Deutch as a member and as a contact with the person believed to be a faculty member, but in which he in no way connected Deutch with any other group or activities other than the student group on the Cornell campus. The opinion of the Court of Appeals mentions that Ross Richardson was in the Labor Youth League but he did not connect Deutch with this organization, nor were any questions asked petitioner about the Labor Youth League.

The subcommittee which heard petitioner was stated by its chairman to have been appointed by the chairman of the full committee "for the purpose of taking this testimony

this morning," [J. A. 54]. It was a different subcommittee composed of different members than in the subcommittees which previously held hearings in Albany or Chicago.

The documents having been introduced over objection, the remainder of the government's case consisted solely of the testimony of one witness, committee counsel Tavenner. He testified that the identification by means of the title on the committee print of Deutch's testimony, ("Education—Part 8") was not a designation of the subject but had been placed thereon by the staff "for convenience". On the contrary, he testified that the subject under inquiry was Communism in the Albany area [J. A. 17].

Doubtless the government avoided designating the subject as being the identity of the student members of the Communist group at Cornell out of concern lest this court ultimately determine that under all the surrounding circumstances, a member of such a group would be protected by the First Amendment from compulsory disclosure of the names of his associates, i.e., that the balance between the need for certain data to be used by the Congress in combating the menace of Communism would be so slight in the case of a half dozen young men meeting under the paternal wing of an FBI agent as to be outweighed by the freedom of political association, which is admittedly infringed upon by compulsory disclosure.

Whatever prompted the government to avoid Cornell as the subject and contrive the implausible labor and Albany area subject, they are bound by what they proved.

The difficulty is that no questions asked Deutch touch upon the infiltration of labor, nor did they touch upon Communist activities in the Albany area, and the evidence is that petitioner never had any knowledge of either of these areas. Petitioner has never been in the Albany area and has never been connected with a labor union. There is thus a flat contradiction between the government's proof at trial and the hearing itself.

The trial judge resolved this dilemma by finding that both subjects—education *and* labor were under inquiry (eliminating Albany). On appeal, the government for the first time argued that the subject was the "inter-relationship between-labor and education." This they did by bringing forth the fact (totally unknown, of course, to petitioner at the time of his hearing) that one of the names petitioner had been asked to identify {Homer Owen} was that of a student at Cornell who had *also* worked in a labor union during the summer and had thus been recruited in the Communist Party. Of course, the committee could have asked petitioner if he knew anything about this practice, if it was one, and he obviously would have answered, but they didn't care to.

Finally, the Court of Appeals, although affirming the conviction and stating that the petitioner knew what the subject was, refrained from designating it altogether.

The first difficulty with this is the obvious one that all of this *ex post facto* attempt to create a subject does not help to satisfy the requirement that the subject appear to the witness at the time of his hearing with indisputable clarity. The government counters this with the argument that the witness is not entitled to the benefits of this rule because, in spite of broad objection to all of the questions on the grounds of jurisdiction and constitutionality, the witness did not invoke a magic formula of words as each question was asked.

But even conceding, *arguendo*, the government's contention on this point, it is still necessary that there *be* a subject under inquiry. The statute itself makes this a required element of the crime. Suppose it is held that the witness, in not having specifically used the word "pertinency" in his general objection, waived the right to be informed as to how each individual question related to the subject matter? Nothing can waive the requirement that there must be a subject under inquiry and proof of said subject is required at trial. This follows, obviously, from

the requirement of simple logic that there must be something to which questions can be pertinent.

Having proved one subject at trial, the government cannot for the first time on appeal elect a different subject. Fundamental due process requires that the defendant have an opportunity at trial, before the trier of fact, to refute each and every essential, factual element of the government's case. This defendant had no opportunity at trial to refute the factual assertion now made that the subject was the interrelation between labor and education. Furthermore, the defense was likewise deprived of an opportunity to contest and argue whether the subject now brought forward was a legitimate subject for inquiry.

In fact, in argument to the trier of fact at trial, appellant's counsel specifically stated that he was not going to argue that Communism at Cornell or in education was not a proper subject because the government had agreed at trial that it was not the subject under inquiry.

After an express renunciation by defense counsel of a right to argue a question of fact (because uncontroverted at trial) can the government now urge that fact upon this court?

An appellate court cannot say that had the government elected to offer different proof at trial that that proof would also have been sufficient to sustain a conviction. *Kotteakos, et al., v. United States*, 328 U. S. 750, 66 Sup. Ct. 169 (1946). See also *United States v. Klass, et al.*, 166 F. 2d 373 (C. C. A. 3d, 1948).

III.

Conviction in This Case Is a Holding That Even Where All Else Is Disclosed to an Investigative Committee, Names of Individuals Are, Per Se, Data Which the Congress Needs in Order to Legislate and May Be Compelled Pursuant to a Valid Legislative Purpose.

No case hitherto before this court has sustained a conviction under 2 USC § 192 where the recusancy of the witness was strictly confined to the identity of others. In the

two cases where this was the information refused, *Watkins* and *United States v. Rumely*, 345 U. S. 41 (1953), this court reversed. In *Barenblatt* this court expressly refrained from passing upon the counts in which the questions were, in this respect, similar to those in the instant case. It is not contended that names may never be related to a valid legislative purpose. It is contended that where the investigation concerns a purported political movement and, as such, is justified in compelling disclosure in spite of the First Amendment only because of the violently revolutionary tenets of the movement, the data needed by Congress is supplied when the witness fully discloses every aspect of the movement except identity.

Under such circumstances the names of individuals, per se, cannot constitute data which the Congress needs in order to legislate intelligently concerning the Communist threat. The legislative branch is concerned with formulating general rules; perhaps petitioner's disclosures about the nature and activities of the campus group were helpful in this respect. Identity of individuals who may or may not be engaged in illegal activity is the concern of the executive branch of the government, which branch was on hand in the person of FBI agent Richardson.

Exposure for exposure's sake is beyond a committee's power and may not be ascribed as a purpose. Can a legislative purpose be found requiring the naming of the Cornell student who invited petitioner to join? Is this not minutiae too insignificant to warrant the infringement of the First Amendment necessary to obtain the information?

IV.

Sustaining Conviction of Petitioner in This Case Requires a Greater Constriction of the Protection of the First Amendment as Balanced Against the Need of the Congress for Information Than in Any Preceding Case.

In the *Barenblatt* case, this court held that where First Amendment rights of the defendant were asserted to bar

interrogation (and hence conviction) that "the issue always involves the balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." 360 U. S. at 126. Conceding that compulsory disclosure of political associations does, in fact, infringe on the First Amendment, this court required that the judiciary weigh this against the need of the Congress for certain data of use to it in framing legislation. Petitioner has contended since his original motion to dismiss was filed in December, 1954, that this balancing of conflicting interests must be made and that if there is any case in which the First Amendment rights are to prevail over the investigative power, that it was petitioner's case.

Neither the trial court nor the Court of Appeals, however, judging from their opinions, applied the test and balanced the factors. The Court of Appeals relied solely on the rationale of *Barsky v. United States*, 167 F. 2d 241, cert. denied 334 U. S. 843 (1948) holding that the names of other people were not beyond the power of a committee to elicit. Petitioner does not contend that they necessarily are, although no conviction for contempt of Congress has thus far been upheld by this court where the refusal to answer was solely as to the names of other people.

It is petitioner's contention that affirmance of conviction in this case involves judicial sanction in favor of the investigative power and in derogation of the protection of the First Amendment to a degree which exceeds this court's decision in the *Barenblatt* case.

Superficially there are similarities in that both petitioner and Barenblatt were questioned largely about Communist activities on a college campus. On the other hand, there are distinct differences. If the weight on one-half of the scale—the public interest side—in turn depends upon the need for Congress to know, there is a distinct and great difference. Barenblatt refused to answer the initial questions as to his own present or past membership in the Party and therefore, naturally, foreclosed from the committee in-

formation about the nature, purposes, methods, means of operating, size, etc., of the campus group. Deutch answered fully and freely on all of these subjects. It can be fairly said that he gave the committee a picture of the group as he knew it. This reduces the data withheld to one of mere identity of others. While not contending that such identification per se can never be elicited, it is nonetheless argued that the identity of others is one step more remote from the type of data which the Congress (distinct perhaps from the investigative agencies of the executive branch) needs to know.

It is also relevant in assessing the balance between the First Amendment-protected area and the public interest in forced disclosure that the entire tragic-comic operation on the campus had been conducted under the auspices of, and apparently largely through, the management of an employee of the FBI—the same Ross Richardson who conducted petitioner to the last few meetings he attended (the last “meeting” was with Richardson alone!), collected his dues to the Party and ultimately named him as a member.

Finally, it would appear that the Cornell group was even less important and less conceivably connected to the national security than the group of which Barenblatt was alleged to have been a member. The “core” legitimizing compulsory disclosure in what otherwise would be a First Amendment-protected political association has been held by this court to be the advocacy by the Communist Party of violent overthrow. In the *Barenblatt* case, it was argued by the defendant that the investigation was aimed not at these revolutionary aspects of Communist activity but at the theoretical classroom discussion. But this was not developed at Barenblatt’s hearing. Here it was. This court pointed out that an investigation of advocacy of overthrow embraced the right to identify a witness as a member of the Communist Party. In the *Barenblatt* hearing (since Barenblatt refused at this threshold to answer even as to his own membership), the committee could go no further. But at

petitioner's hearing, that question was freely answered and the committee had an opportunity to explore to as great an extent as they wished all aspects of this student group and its tenets, which, to a large extent, they did; and petitioner, testifying under oath, subject to the pains and penalties of perjury, stated flatly that he never met anyone that advocated the overthrow of the government by force and violence and "if they had I would have not have allowed it" [J. A. 64]. At another point, he said they did not believe in force and violence [J. A. 56-57]. There was a colloquy on this point between petitioner and committee members [J. A. 63-64]. If the testimony of the group's leader, the FBI agent, conflicted with this, petitioner could be indicted for perjury.

If it is the violent revolutionary aspects of the Communist Party which justifies compulsory disclosure which would not be permissible were this feature absent, what is the situation where at the hearing itself, this aspect of a particular Communist group is freely discussed by the witness to the full extent that the committee desires to interrogate him?

The need to know concerning this "core" has been satisfied and the identity of others is peripheral and tangential. This situation is far different from the *Barenblatt* situation in which the witness, by refusing to answer the initial question of his own involvement in the Communist Party, forestalls any exploration of the nature of the particular group in which he is alleged to have participated. In that posture, his argument on appeal to the effect that his group was only interested in theoretical aspects was more easily rejected by this court, since that is a matter that the committee might have wished to explore.

CONCLUSION.

Petitioner contends that he falls within the *Watkins* situation with respect to the inadequacy of his knowledge of the subject matter.

In any event, there must be some subject under inquiry proved and the government is bound by the subject they elected to prove over defense objection at the trial, and if it appears that none of the questions asked petitioner dealt with that subject, conviction must be reversed and due process requires that a different subject may not be contrived on appeal, no matter how justified that subject might have been if proved at trial.

Finally, the petitioner has tried to demonstrate that affirmance of his conviction will, under all of the circumstances, advance the *Barenblatt* doctrine to further restrict the First Amendment-protected area in favor of the investigative power.

In no other case except the *Watkins* case has this court had to confront a situation where the witness answered freely except as to the names of others; in no other case was every aspect of petitioner's area of knowledge of Communist activities as fully and completely developed at the hearing. The granting of a writ of certiorari in this case would place before the court the question as to whether or not the acquisition of names per se as an end in itself can ever constitute data which the Congress needs in order to legislate.

Respectfully submitted,

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APPENDIX A.

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 13,694

BERNHARD DEUTCH,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Decided June 18, 1960

Mr. Henry W. Sawyer, III, of the bar of the Supreme Court of the United States, *pro hac vice*, by special leave of court, with whom *Mr. George Herbert Goodrich* was on the brief, for appellant.

Miss Doris Spangenburg, Assistant United States Attorney, for appellee. *Messrs. Oliver Gasch*, United States Attorney, *Carl W. Belcher*, *Lewis Carroll*, *William Hitz*, and *Harold D. Rhynedance, Jr.*, Assistant United States Attorneys, were on the brief for appellee. *Mr. John D. Lane*, Assistant United States Attorney, also entered an appearance for appellee.

Before WASHINGTON, BASTIAN and BURGER, *Circuit Judges.*

(1a)

BASTIAN, Circuit Judge: This is a contempt of Congress case arising from a hearing held by a subcommittee of the House Committee on Un-American Activities. Appellant Deutch was indicted for contempt for his refusal to answer certain questions.¹ He was tried in the District Court by a judge sitting alone (jury having been waived), convicted and sentenced on four of the five counts of the indictment.² On appeal, appellant urges that the subject matter under inquiry and the pertinency to that subject matter of the questions set forth in the indictment were not proved by the Government beyond a reasonable doubt to have appeared with indisputable clarity at the time of the subcommittee hearing. Appellant also attacks the legislative purpose of the investigation and the power of the committee to engage in exposure. He also objects to the admission of certain documentary evidence at the trial. Lastly, he relies on his rights under the First Amendment.

In July 1953, the committee began hearings in Albany, New York, in connection with a general investigation of communist activities in that area.³ At these hearings,

1. The questions listed in the indictment (the numbering being that of the counts) were these:

1. The committee was advised that a witness by the name of Ross Richardson has stated that you acted as liaison between a Communist Party group on the campus and a member of the faculty at Cornell, and that you knew the name of the member of that faculty, who was a member of the Communist Party. Will you tell us who that member of the faculty was?

2. Will you tell the committee, please, the source of that \$100 contribution, if it was made?

3. Where were these meetings held?

4. Were you acquainted with Homer Owen?

5. The witness is directed to give the name of the person by whom he was approached.

2. The circumstances under which the appeals in this case and seven other contempt of Congress cases came on for hearing in this court appear in footnote 2 of the opinion in No. 13,464, *Gojack v. United States*, decided this day.

3. The committee had also, on February 25, 1953, begun a series of hearings on communist infiltration into education, and on that day

there was testimony to the effect that during the period 1947-1953 a communist cell was active on the campus of Cornell University and that students enrolled at the university were accepting positions with communist-controlled labor unions. The committee also received information that appellant had participated in this communist activity and that he might know the name of a professor (theretofore unknown) of the university who had obtained funds for the communist cell. The committee determined to call appellant to inquire into these activities relating to both communism in education and communist infiltration into labor unions.

Thereafter, the committee interrupted the Albany hearings and announced that further hearings were postponed until a later date. The hearings were resumed in Albany in April 1954. At the commencement of the reopened hearing (April 7, 1954), the Chairman of the subcommittee made the following statements:

"This committee is charged by the Congress of the United States with the responsibility of investigating the extent, character, and objects of un-American propaganda activities in the United States, the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries, or of a domestic origin, and attacks the principles of the form of government as guaranteed by our Constitution and all other questions in relation thereto that will aid Congress in any necessary remedial legislation.

"The Committee on Un-American Activities will resume this morning the investigation of Communist Party activities within the capital area. This is a

the Chairman of the committee made a full and complete statement of the purposes of the investigation. The material portions of the opening statement of the Chairman appear in note 31 of the Supreme Court's opinion in *Barenblatt v. United States*, 360 U. S. 109, 130-131.

Appendix A

continuation of the open hearings which were conducted in Albany between July 13 and 16, 1953. The investigation has been extended into adjacent areas, from which witnesses are also expected to be heard.

"A public announcement was made in January that hearings would be resumed here at a much earlier date, but due to my desire not to interfere with sessions of the Federal court, and for reasons beyond the committee's control, it became necessary to postpone them until this time.

* * *

"Other testimony taken at the 1953 Albany hearings related to the efforts of the Communist Party to infiltrate industry and other segments of society in the capital area. Testimony now to be heard is expected to supplement that formerly given on this subject and as indicated will extend into adjacent areas.

"I want to emphasize what I have stated hitherto, namely that the committee is not concerned with the political beliefs or opinions of any witness. It is concerned only with facts showing the extent, character, and objects of Communist Party activities within the areas from which the witnesses are subpoenaed.

"I desire also to make it clear that this committee is not interested in any dispute between management and labor or with internal disputes within the field of labor. However, the committee considers that it has a legislative mandate to investigate the extent, character, and objects of Communist Party activities wherever evidence of its existence is found, and this it proposes to do.

"This committee is not investigating labor unions, but it is investigating communism within the field of labor where it has substantial evidence that it exists. Such an investigation is particularly pertinent at this

time when the Committee on Un-American Activities is engaged in the study of H. R. 7487 which has been referred by the Speaker of the House to this committee.

"In keeping with the long-standing policy of this committee, any individuals or organizations, whose names are mentioned during the course of the hearing in such a manner as to adversely affect them, shall have an opportunity to appear before the committee for the purpose of making a denial or offering an explanation of such adverse information."

One of the witnesses called on April 7, 1954, testified as to communist activities at Cornell University from 1947 to 1951. On April 8, 1954, another witness⁴ testified that he [the witness] became a member of the communist group at Cornell and was assigned to the Labor Youth League, "which is a sort of training for future communist members." This witness gave testimony about communist activities at the university and stated that Deutch had acted as a contact man, in 1952 and 1953, between the Communist Party and a member of the faculty whose name was unknown to the witness. He also testified that appellant had received a contribution for the Communist Party from an unknown source. For this reason, appellant was subpoenaed to appear before the committee in Albany on April 9, 1954.

As his counsel protested the shortness of time, appellant was granted a continuance to April 12, when, accompanied by his counsel, he appeared before the committee in executive session in Washington, D. C. He was at that time 25 years of age, a graduate student attending the University of Pennsylvania, having previously studied at Cornell. He was represented at the hearing by the same counsel who represented him in the District Court and in this court, and who had secured the continuance for him.

4. This witness joined the Communist Party with the full knowledge of and at the request of the Federal Bureau of Investigation.

Appellant asked for and was granted frequent opportunities to confer with his counsel. • Never once did he indicate unawareness of the purpose of the hearing, or doubt as to the pertinency of the questions. At the outset of the hearing, he was informed and questioned by the committee counsel, Mr. Tavener, as follows:

“Mr. Deutch, during hearings at Albany last week, the committee heard testimony regarding the existence of a Communist Party group or cell operating among undergraduates at Cornell University, among certain graduates at Cornell and in the city of Ithaca.

“In connection with that testimony, the committee was informed that you were a member of one or more of those groups. If so, I would like to ask you certain matters relating to your activity there.

“Were you a member of a group of the Communist Party at Cornell?”

After conferring with his counsel, Mr. Sawyer, Deutch responded under protest that he had been a member of the Communist Party. His objection and answer to the question were as follows:

“I wish to register a challenge as to the jurisdiction of this committee under Public Law 601, which is the committee's enabling legislation. This question, or any similar questions involving my associations, past or future, I am answering, but only under protest as to its constitutionality. But, under your jurisdiction as stated, I answer yes, I was a member of the Communist Party.”

Committee counsel continued:

“The committee was advised that a witness by the name of Ross Richardson has stated that you acted as liaison between a Communist Party group on the campus and a member of the faculty at Cornell, and

that you knew the name of the member of that faculty, who was a member of the Communist Party.

"Will you tell us who that member of the faculty was?"

After again conferring with his counsel, appellant stated:

"Sir, I am perfectly willing to tell about my own activities, but do you feel I should trade my moral scruples by informing on someone else?"

He was advised that moral scruples on his part "do not constitute a legal reason for declining to answer the question," and he was directed to answer. He declined, stating that he would not answer questions about other people, but only about himself.

Representative Doyle, a member of the subcommittee, then made the following statement:

"The young man read a statement in which he referred to Public Law 601. He no doubt read point 1 in that law in which it states our duty in Congress is to inquire into the extent—that is the language—'the extent.' Now manifestly our counsel, in asking you the name, etc., goes into the extent of the existence of the Communist cell, don't you see? All Communist activities. I wanted to emphasize that to you because you were referring to Public Law 601 and relying on that in your statement which you read. So I can come right back to you and ask, or call to your attention the fact that under our Congress we have the duty or we are charged with looking into the extent, you see, which the Communist Party has acted. Therefore, you see, I am calling your attention to the fact that this question goes into the extent. I just wanted to call that to your attention, just in case you didn't realize the kind of question that was."

Committee counsel then proceeded to ask the question forming Count 2 of the indictment:

"The committee received testimony from Ross Richardson to the effect that you collected certain donations for the benefit of the Communist Party, and that on one occasion you delivered to him the sum of \$100, without designating to him the source of it. Will you tell the committee, please, the source of that \$100 contribution, if it was made?"

Appellant declined to answer, and thereafter, although directed to do so, specifically refused to answer the question.

Count 3 of the indictment is not before us as that count was dismissed by the District Court.

Committee counsel then asked the question forming Count 4:

"Were you acquainted with Homer Owen?"

Deutch refused to answer, stating that he did not think he "should discuss any people from now on because some people I am acquainted with and some I am not, so I don't think I want to discuss the people's names." He was directed to answer, but again he declined.

Deutch then related why he became interested in the Communist Party but refused to answer questions forming the basis of Count 5 of the indictment as to the identity of the person who had approached him on behalf of the Party. He was directed to answer, but declined, without giving reasons.

Appellant answered all further questions, none of which required him to give the names of other persons.

The District Court found that "the Committee was investigating the infiltration of communism into educational and labor fields," and decided that the questions in Counts 1, 2 and 5 were pertinent, on their face, to that subject.

With respect to Count 4, the court pointed out that Homer Owen had been a student at Cornell University

in an industrial relations course and that students in that course did temporary summer work in various labor unions, some of which were communist-controlled; that the committee desired to know what, if any, connection there was between students enrolled in that course and the communist-controlled unions; that the question of whether appellant was acquainted with Homer Owen was obviously a preliminary question that might have led to a line of inquiry within the scope of the inquiry, and, consequently, was a pertinent question.

Appellant was thereupon found guilty and sentenced.⁵

We believe the Government has proved beyond a reasonable doubt that the subject under inquiry and the pertinency of the questions were made to appear at the committee hearing with "indisputable clarity." See *Barenblatt v. United States*, 360 U. S. 109 (1959); *Watkins v. United States*, 354 U. S. 178 (1957); cf. *Flaxer v. United States*, 358 U. S. 147 (1958). The Supreme Court has indicated that the subject of a legislative investigation is "indisputably clear" when, considering all circumstances which may legitimately control the course of a congressional inquiry and which may be relevant to the awareness of the witness, the nature and purpose of the inquiry have been given such definiteness as to warn a reasonable man on the witness stand of the likelihood of criminal conviction, and to enable a trial court, jury and appellate court to perform their respective functions. See *Barenblatt v. United States*, *supra*; *Watkins v. United States*, *supra*. The pertinency of the questions asked appellant must be decided in the light of similar considerations.

Throughout his testimony, Deutch testified as to his own activities but, in reference to each of the counts under which he was convicted, he declined to answer the questions, not on the ground of pertinency or on any other ground

5. The opinion of Judge Holtzoff finding the appellant guilty is reported in 247 F. Supp. 89.

except that it was against his "moral scruples" to answer questions about other people. Nor did he claim that he did not understand how the questions related to the subject under inquiry, or what that subject was. On the contrary, it is quite obvious that he recognized that the questions were pertinent to the subject under inquiry, and he based his refusal to answer solely and simply on the fact that he did not wish to give the names of other persons. That appellant was made fully aware of and was in fact aware of the purpose of the hearing and the pertinency of the questions seems to us to be free from doubt. The trend of the questions and his attitude toward them are significant; and the above quoted statements made to him by the committee counsel and a committee member clearly indicated the object of the inquiry and the pertinency of the questions. Not until the trial in the District Court, in what appears to be afterthought, did appellant raise the questions of pertinency and unawareness of the subject matter of the inquiry.

Appellant relies upon the objections above quoted, made at the commencement of the hearing at which he testified, and urges that his objection to the committee's jurisdiction and the constitutionality of the proceedings required explanation by the committee of the subject matter and the pertinency of any questions which might be asked. We cannot agree. It would require real stretching of the imagination to read into the statement made by Deutch an objection to pertinency—or anything that would in the slightest degree indicate that he was unaware of the subject under inquiry.

So far as appellant's claim that the questions involved here violate his First Amendment rights, we think this claim is foreclosed by *Barsky v. United States*, 83 U. S. App. D. C. 127, 167 F. 2d 241, cert. denied, 334 U. S. 843, (1948), wherein we held that the "nature and scope of the program and activities [of the Communist Party] depend in large measure upon the character and number of

its adherents," and that personnel is part of the subject. We do not read *Barenblatt* as to the contrary. As a matter of fact, *Barenblatt* recognized that First Amendment rights are not absolute and that resolution of the issue between those rights and the public interest involves a balance by the courts of the competing interests, and held that Congress should not be denied the power to legislate solely because the field of education is involved. In the present case, prior witnesses had made certain statements but their testimony was inconclusive on the question of personnel. Indeed, we know of no reason why the committee was not entitled to have cumulative evidence of activities in connection with the continuing communist conspiracy.

We have examined the other contentions of appellant and find them equally without merit.

Affirmed